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No. 99-596

In the
Supreme Court of the United States

George Mason University,

Petitioner,

v.

United States of America and Annette Greco Litman,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE and BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF A*MICUS CURIAE*

Pursuant to Supreme Court Rule 37, the Center for the Original Intent of the Constitution respectfully submits this motion for leave to file the attached brief *amicus curiae* in support of the petition for writ of *certiorari*. Written consent for *amicus* participation in this case was granted by counsel for the petitioners and counsel for the United States and lodged with the Clerk of this Court.

Counsel for Respondent Annette Greco Litman responded to our request for consent as follows:

> We fail to see how the Home School Legal Defense Association, which has home schools as members, would have any standing whatsover to deal one way or another with the issues of federal aid to state colleges or gender discrimination in public schools.
>
> Therefore, we would object to your request to participate as amicus in this case.

Letter from Alan Banov, Counsel for Annette Litman, to Scott Somerville, Home School Legal Defense Association (Nov. 16, 1999) (on file with Clerk of the Supreme Court).

Attorney Banov seems to confuse "standing," which we lack, with "interest," which we do not. The Center for the Original Intent of the Constitution operates under the auspices of Patrick Henry College. Patrick Henry College, in an effort to preserve its independence, refuses to accept any federal funding. Patrick Henry's mission statement clearly

states, "No direct or indirect governmental funding of any kind will be accepted."

Our interests go beyond how this case may affect our future funding, however. We follow a standard of patriotism set in the Virginia ratification debates by George Mason (after whom the university in this case is named) and Patrick Henry (after whom our own college is named). Mason and Henry distrusted centralized power. Though both men strongly favored union with the other States, they feared that an overly-strong federal government could ultimately devour the sovereignty of Virginia. James Madison, chief architect of the Constitution, responded to those fears by spelling out the limits on the new central government. But he did not ask Mason and Henry to simply take his word for it. He asked them—and all his countrymen—to *hold* the federal government to that word. Madison said:

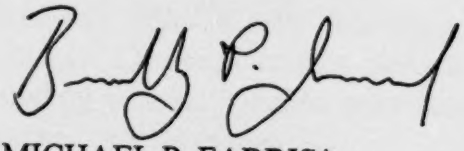
> I know this government will be cautiously watched. The smallest assumption of power will be sounded in alarm to the people, and followed by bold and active opposition. I hope that my countrymen will keep guard against every arrogation of power.

Jonathan Elliot, Debates on the Adoption of the Federal Constitution, Vol. 3, p.206-7 [hereinafter, Elliot's Debates].

Today, 211 years after the Virginia ratification debates, this *amicus* seeks to help hold the federal government to the terms of Madison's promise. Madison drafted a Constitution that was intended to preserve the blessings of liberty for himself *and* his posterity. We, as heirs of that liberty, seek to sound the alarm when liberty is threatened.

For these reasons, the Center respectfully requests that this Court grant its motion for leave to file the attached brief *amicus curiae*.

Respectfully Submitted,



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QUESTION PRESENTED

George Mason University is an agency of the Commonwealth of Virginia, and Virginia insists that it has not waived its sovereign immunity from this Title IX suit. The Fourth Circuit ruled that even though Congress cannot abrogate immunity through the Spending Clause, Virginia contracted away its rights when it accepted federal money.

Question presented: Did the founding generation intend to give Congress the power to invade the residuary sovereignty of State governments by tying otherwise unconstitutional federal demands to "general welfare" spending?

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INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

In our first brief, we argued that principles of *dual sovereignty*, implicit in the structure of the Constitution, prohibited Congress from abrogating state sovereign immunity in state courts. *Alden v. Maine*, 199 S.Ct. 2240 (1999). In our second brief, we argued that dual sovereignty prohibits Congress from directly regulating state governments through the Commerce Clause. *Reno v. Condon*, No. 98-1464 (U.S. argued Nov. 10, 1999). In this brief, we argue that our Founders did not intend to give Congress the power to spend unenumerated funds in a manner that both intrudes upon a state's general police powers and conditions the outlay of funding on a state's waiving its sovereign immunity.

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[1] This brief was not authored in whole or in part by counsel for any party. It has been funded in its entirety by the *amicus curiae*. No person or entity has made a monetary contribution specifically for the preparation or submission of this brief. *See* Sup. Ct. Rule 37.6.

The *amicus curiae* requested the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. *See* Sup. Ct. Rule No. 37.3(a). Counsel for Annette Greco Litman refused consent, and a motion for leave to file has therefore been submitted.

Our Constitution guarantees a republican form of government in every State. U.S. Const. Art. IV, § 4, cl. 1. In light of the never-ending accumulation of federal power, however, and the increasing irrelevance of state and local governments, we fear that this constitutionally-guaranteed government is an endangered species. We seek to save it.

This Court has yet to indicate just how the Guarantee Clause is to be enforced. In the absence of any clear judicial remedy, the best we know how to do is to engage in consistent, passionate advocacy for the original intent of the Constitution.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they made promises which "we the people" still rely upon. Those promises are what is ultimately at stake in this case.

SUMMARY OF THE ARGUMENT

The Circuits are split on the question of whether Congress can make states waive all sovereign immunity as a condition of receiving federal funds. Our Founders were never split on this issue. James Madison viewed this as a simple question with only one possible right answer: Congress can only spend money under its *enumerated* powers.

The Fourth Circuit suggests—and we agree—that this Court's precedents are out of step with the original intent of the Constitution. As Judge Niemeyer said:

> If the Supreme Court were one day to adopt a Madisonian construction of the Spending Clause, perhaps Congress would be inhibited from implementing a spending program that both intruded upon a state's general police powers and conditioned the outlay of funding on a state's waiving its sovereign immunity. In deciding this case, however, we are bound by the Court's existing constructions of the scope of Congress' spending power.

Litman v. George Mason University, 186 F.3d 544, 556 (4th Cir. 1999) .

The Fourth Circuit interprets existing precedent to say that Virginia made a bargain with the federal government, and by so doing has lost its sovereign immunity. Virginia *has* made a bargain, but it is not the one the Fourth Circuit identified. Virginia made its bargain 212 years ago, when it entered into a compact with twelve other States to establish a *limited* federal government with *enumerated* powers. That is the bargain that controls this case. That is the bargain this Court must enforce.

ARGUMENT

THE FOUNDING GENERATION WOULD NOT HAVE RATIFIED THE CONSTITUTION IF THEY THOUGHT SOVEREIGNTY COULD BE LOST THROUGH SPENDING

The Fourth Circuit ruled that Virginia bargained away its sovereign immunity when it continued to accept federal funding after Congress amended Title IX by adding the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7(a)(1). That court suggests that James Madison would not tolerate such a result, but implies that Alexander Hamilton would. As we will show, neither Madison nor Hamilton would permit such an invasion of residuary sovereignty.

A. JAMES MADISON PROMISED VIRGINIA THAT FEDERAL SPENDING WOULD BE LIMITED

Money is power, and our Constitution was designed to limit power. That is why our Founders took such pains when it came to money. For example, there were passionate arguments at the Constitutional Convention against giving the federal government any power to tax. Richard Henry Lee, of Virginia, saw the potential for danger:

> Mr. LEE, in answer to Mr. Madison, said...it was an established truth that the purse ought not to be put into the same hands with the sword.... He said, it had been urged by several in behalf of such an establishment for public credit, that without it Congress was nothing more than a rope of sand. On this head he would be explicit; he had rather see Congress a rope of sand than a rod of iron.

5 Elliot's Debates, *supra*, 56-57.

The "purse" and "sword" meant much to the founding generation. Under English constitutional law, Parliament held the power of the purse, while the King wielded the sword. Taxes were idealized as the people's gift to the crown; which is why colonists were so outraged when taxes were imposed on colonies that had no members in Parliament. The slogan, "No Taxation Without Representation," may have sparked a revolution, but it was in no way revolutionary. Lovers of English liberty had learned—the hard way—to keep a jealous watch over the power of the purse.

Virginia would not have ratified the Constitution without repeated assurances that the power to spend would not be abused. Madison led the effort to get Virginia to ratify the Constitution, while Patrick Henry and George Mason used all their rhetorical powers to defeat it. Over and over again, those ardent Virginia patriots pointed to the dangers of unlimited government lurking within the "Necessary and Proper Clause" and the "General Welfare Clause." *See, e.g.*, 3 Elliot's Debates, *supra*, 149-50; 423; 436-38; 441; 455. Madison rose to rebut their claims:

> I shall take notice of what the honorable gentleman said with respect to *the power to provide for the general welfare*. The meaning of this clause has been perverted, to alarm our apprehensions. The whole clause has not been read together. It enables Congress "to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises, shall be uniform throughout the United States." The plain and obvious meaning of this is, that no more duties, taxes, imposts,

> and excises, shall be laid, than are sufficient to pay the debts, and provide for the common defence and general welfare, of the United States.

3 Elliot's Debates, *supra*, 207 [*emphasis supplied*].

Three years after the Constitution was ratified, Madison further clarified his view on federal spending. In a debate on the Cod Fishery Bill, in 1792, Madison explained why it was unconstitutional for the federal government to pay out "general welfare" money for unenumerated purposes:

> It is supposed, by some gentlemen, that Congress have authority not only to grant bounties in the sense here used, merely as a commutation for drawback, but even to grant them under a power by virtue of which they may do any thing which they may think conducive to the general welfare! This, sir, in my mind, raises the important and fundamental question, whether the general terms which have been cited are to be considered as a sort of caption or general description of the specified powers; and as having no further meaning, and giving no further powers, than what is found in that specification, or as all abstract and indefinite delegation of power extending to all cases whatever—to all such, at least, as will admit the application of money—which is giving as much latitude as any government would well desire.

4 Elliot's Debates, *supra*, 427.

Madison's point in the Cod Fishery debate was not to express his own opinions (significant as those might be to our interpretation of the Constitution today), but to remind his hearers that the Constitution was only ratified because the States *believed* the federal government had a limited power to spend:

> I, sir have always conceived—I believe those who proposed the Constitution conceived—it is still more fully known, and more material to observe, that *those who ratified the Constitution conceived*—that this is not an indefinite government, deriving its powers from the general terms prefixed to the specified powers—but a limited government, tied down to the specified powers, which explain and define the general terms.

4 Elliot's Debates, *supra*, 427-28 [*emphasis supplied*].

Madison's conviction on this point never wavered. Forty-one years after the Constitution was ratified, Madison still continued to insist that ours is a *limited* government, and that this limitation applies specifically to the ability of Congress to use its power to tax and spend. Madison still pointed to the Virginia debates for proof of that point. In 1830, he wrote:

> Consider, for a moment, the immeasurable difference between the Constitution, limited in its powers to the enumerated objects, and expanded as it would be by the import claimed for the phraseology in question. The difference is equivalent to two constitutions, of characters essentially contrasted with each other; the one possessing powers confined to

> certain specified cases, the other extended to all cases whatsoever. For what is the case that would not be embraced by a general power to raise money, a power to provide for the general welfare, and a power to pass all laws necessary and proper to carry these powers into execution—all such provisions and laws superseding, at the same time, all local laws and constitutions at variance with them? Can less be said, with the evidence before us furnished by the Journal of the Convention itself, than that it is impossible that such a constitution as the latter would have been recommended to the states by all the members of that body whose names were subscribed to the instrument?

Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), *reprinted in* 4 Elliot's Debates, *supra,* 613-14.

The Fourth Circuit treated this as a contract case, in which Virginia entered into an enforceable contract with the federal government when it accepted federal funds. Under a Madisonian view of spending, the federal government could only enter into a binding contract if it was spending money pursuant to its enumerated powers. Any other spending would be *ultra vires.* It cannot constitute "consideration" for a contract that takes away the reserved powers of the States.

Thus, Congress cannot spend money to accomplish a purpose by attaching "strings" to a spending bill if it cannot accomplish that same purpose through direct regulation. This Court has made it abundantly clear that Congress cannot use Article I power to abrogate state sovereign immunity directly. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44

(1996); *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Savings Bank v Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educa. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999). It may not use spending power to do so indirectly.

B. ALEXANDER HAMILTON PROMISED NEW YORK THAT SOVEREIGNTY WOULD BE SECURE

The Fourth Circuit suggests that Virginia cannot win this case unless this Court adopts a "Madisonian" view of spending, but Alexander Hamilton would disagree. Hamilton never suggested that Congress' could invade the reserved powers of the States through federal spending. To the contrary: he argued that such acts would be "acts of usurpation." The Federalist No. 33, at 226 (A. Hamilton) (J. Hamilton ed. 1869).

Hamilton's public statements about "usurpation" determine this issue, not his personal opinions about spending. To understand the different impact of his public and private views, we must recall the two primary reasons to examine the views of our Founders in any constitutional debate.

First, we may find that the Founders' *personal* views on the issues of the day help us grasp shades of meaning that we would otherwise miss. Such insights are like the "persuasive precedent" of a court opinion from another jurisdiction. But a second, more significant reason for considering the views of the Founders is to discern the meaning of terms that the members of the ratifying conventions expressly had in mind when they ratified the constitutional contract. Without our Founders' solemn assurances on precise points, we would

not have this Constitution today. We should therefore treat those promises with all the force of "binding precedent."

Hamilton's public statements matter because his role in "selling" the Constitution to the citizens of New York cannot be overestimated. As one historian says:

> In the New York campaign, which followed the Constitutional convention, Hamilton seems to have been everywhere and everybody. His work in this contest can never be exaggerated. The people of New York were opposed to the new Constitution, the politicians were against it, and the task of inducing the Empire State to adopt the new instrument seemed hopeless. The Constitutional convention at the beginning was nearly two-thirds against the proposed measure. Yet in face of all these odds, Hamilton led his forces to victory. He threw himself into the fight body, mind and soul and by a display of oratory, parliamentary skill, personal magnetism, tact and judgment he overcame opposition and had the Convention adopt the Constitution by a majority of three.

8 William Jackson, History of the American Nation, p.2330 (1911).

Hamilton made solemn promises to the citizens of New York. He addressed their fears by insisting that the federal government could never invade the residuary sovereignty of the States. He expounded a concept that this Court has since labeled *dual sovereignty*. As he put it:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government, which is only another word for POLITICAL POWER AND SUPREMACY. But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely *acts of usurpation*, and will deserve to be treated as such.

Federalist No. 33, at 226 [*emphasis supplied*].

Hamilton took his stand for dual sovereignty in the New York Ratification Debates, saying:

> [The opponents of the Constitution argue] that the laws of the United States are supreme and that where there is one supreme there can not be a concurrent authority; and further, that where the laws of the Union are supreme those of the States must be subordinate, because there can not be two supremes. This is curious sophistry. That two supreme powers can not act together is false. They are inconsistent only when they are aimed at each other or at one indivisible object. The laws of the United States are supreme as to all their

> proper constitutional objects; the laws of the States are supreme in the same way. These supreme laws may act on different objects without clashing, or they may operate on different parts of the same common object with perfect harmony. Suppose both governments should lay a tax of a penny on a certain article; has not each an independent and uncontrollable power to collect its own tax? The meaning of the maxim, there can not be two supremes, is simply this—two powers can not be supreme over each other.

2 Elliot's Debates, *supra*, at 355-56.

According to Hamilton, two "supreme powers" are inconsistent only when they are aimed at each other or at one indivisible object. There is no inconsistency when two governments each levy a tax of one penny, nor is there any inherent inconsistency if two government each spend a million dollars for the same purpose. But in this case, there would be an inconsistency: the federal government says that Virginia can be sued in federal court, but Virginia says it cannot. According to Hamilton's logic, one or the other OF THESE powerS must have the final say on sovereign immunity.

This Court has recently ruled that the State, not the federal government, has the final say on sovereign immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 119 S. Ct. 2240 (1999). The only exception to this rule is when Congress acts pursuant to its powers under the Enforcement Clause of the Fourteenth Amendment. *See*, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). As Justice Kennedy put it:

> When a "Law...for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions...it is not a "Law...proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such."

Alden, 119 S. Ct. at 2256, *citing Printz v. United States*, 521 U.S. 898, 924 (1997).

This Court's New Deal jurisprudence has made much of a "Hamiltonian" view of spending. *See, United States v. Butler*, 297 U.S. 1 (1936). *Butler* concluded, "The power to tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money." *Butler*, 297 U.S. at 88. This Court upheld such conditional giving, over the objections of South Dakota (and Justices Brennan and O'Connor), in *South Dakota v. Dole*, 483 U.S. 203 (1987).

Under the "Hamiltonian" view of spending upheld in *Butler*, the federal government can make a sovereign State jump through federal hoops if it wants its full share of federal money. Congress can place conditions on its gifts. But, as any first year law student must learn, a "conditional gift" is not a "contract." A State can accept a "gift" without losing its freedom. But a "contract" binds it.

Hamilton's *personal* views on federal spending would permit conditional giving. Madison's would not. But Hamilton's personal views matter little in this case. New York ratified the Constitution on the basis of Hamilton's *public* assurances about the limits of federal power. We dare not

break faith with the generation that took Hamilton at his word to pursue some "Hamiltonian" concept of spending.

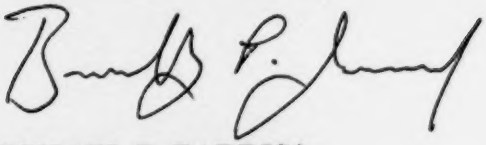
CONCLUSION

James Madison promised Virginia that federal power was *limited* in the Virginia Ratification Debates 1788. The power to spend, Madison insisted, was limited to certain *enumerated* powers. Alexander Hamilton may have had a broader view of federal power, but he promised New York that it would not invade the residuary sovereignty of the States. Relying on these express assurances, Virginia became the tenth State to ratify the Constitution, and New York became the eleventh.

The Fourth Circuit treated the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d, as a binding contract between the Commonwealth of Virginia and the United States. James Madison would disagree. Spending outside of Congress' enumerated powers is *ultra vires*, and cannot form the basis of a binding contract. Even under a "Hamiltonian" view of spending that allows for conditional gifts, a *gift* cannot take away the sovereign immunity of an unconsenting State.

If there is a contract that must be honored in this case, it is the contract that was established between "we the people" of the Commonwealth of Virginia and the rest of the Union in 1788. The Fourth Circuit has set aside that solemn compact to honor a hypothetical "deal" that allegedly came into existence when Virginia accepted federal money with strings attached. That cannot be correct. This Court should grant *certiorari* in this case.

Respectfully Submitted,



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REPLY

BRIEF

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

George Mason University, by and through its counsel, the Attorney General of the Commonwealth of Virginia, files this Reply Brief in support of its Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

As an initial matter, the University wishes to advise the Court of three recent developments affecting this Petition. First, on January 11, 2000, this Court ruled that Congress' attempt to abrogate sovereign immunity for Age Discrimination in Employment Act claims was invalid. *See Kimel v. Florida Bd. of Regents*, 120 S. Ct. ___, 2000 WL 141012 (2000). In doing so, this Court stated "Congress' powers under Article I of the Constitution do not include the power to subject States to suits at the hands of private individuals." *Id.* at ___. This statement, which is simply a reaffirmation of the holding of *Seminole Tribe v. Florida*, 517 U.S. 44 (1995), contradicts the holding of the lower court. The lower court held that Congress *could* use its Article I Spending Clause power to exact a waiver of sovereign immunity.

Second, on December 14, 1999, the U.S. Court of Appeals for the Eighth Circuit granted rehearing *en banc* on that portion of the panel opinion in *Bradley v. Arkansas*, 189 F.3d 745 (8th Cir. 1999) holding that 42 U.S.C. § 2000d-7 is unconstitutional to the extent that it requires a State to waive sovereign immunity as a condition of receiving federal funds under the Rehabilitation Act. *See Jim C. v. Arkansas Dep't of Educ.*, ___ F.3d ___, 1999 WL 1209784 (8th Cir. Dec. 14, 1999). As explained in the

Petition, the *Bradley* panel opinion was directly contrary to the judgment below and, thus, created a split in the circuits. By granting rehearing *en banc*, the Eighth Circuit has obviated the conflict among the courts of appeal at least for the moment. Of course, if the full Eighth Circuit reaches the same result as the panel, the conflict among the courts of appeal will be restored and will be more serious.

Third, on November 30, 1999, the U.S. Court of Appeals for the Eleventh Circuit upheld 42 U.S.C. § 2000d-7 to the extent that it requires the States to waive their sovereign immunity as a condition of receiving federal funds under Title VI. *See Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *petition for rehearing filed* (11th Cir. Dec. 21, 1999).

REASONS FOR GRANTING THE PETITION

I. THE WRIT SHOULD BE GRANTED TO RESOLVE THE INHERENT CONFLICT WITHIN THIS COURT'S JURISPRUDENCE.

In opposing the Petition, the Respondents implicitly demonstrate why the Petition should be granted. By focusing on the fact that the lower court's decision is consistent with this Court's Spending Clause decisions and ignoring the fact that it is inconsistent with this Court's federalism jurisprudence, the Respondents illuminate the inherent conflict within this Court's jurisprudence. This Court should grant review in order to reconcile this inherent conflict.

The terms of the conflict are clear. As the National Government's brief demonstrates, this Court's Spending Clause decisions can be interpreted as allowing Congress to force the States to surrender some of their "sovereign interests" as a condition of receiving federal funds. (U.S. Resp. at 8-11.) For example, although Section 2 of the Twenty-first Amendment, U.S. Const. amend XXI, § 2, "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system," *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980), this Court found that Congress could force the States to change their drinking age as a condition of receiving federal funds. *See South Dakota v. Dole*, 483 U.S. 203, 208 (1987). Similarly, this Court held that Congress could condition the receipt of federal funds on the agreement of the State to appoint non-partisan persons to certain positions. *See Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 143 (1947). *See also North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D. N.C. 1977), *aff'd mem.*, 435 U.S. 962 (1978) (summarily affirming a decision upholding a requirement that the States create a particular State agency as a condition of receiving federal funds). If Congress can require the States to give up their sovereign powers to regulate alcohol, to choose who will be their public employees, and to determine how their government is organized, then the Spending Clause power is almost plenary in nature.[1]

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[1] Although this Court's decisions have suggested that some conditions may be so coercive as to be unconstitutional, *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937), the National Government has stated that "when it comes to the relationship

In contrast, this Court's recent federalism decisions significantly limit the power of the National Government to disrupt the sovereignty of the States. As this Court observed:

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

Alden v. Maine, 119 S. Ct. 2240, 2268 (1999). For example, the National Government cannot commandeer local law enforcement officials to enforce *federal* law. *See Printz v. United States*, 521 U.S. 898 (1997). Similarly, the National Government cannot force a State to adopt specific state legislation, *see New York v. United States*, 505 U.S. 144 (1992), or dictate the location of the seat of government, *see Coyle v. Smith*, 221 U.S. 559, 565 (1911). Moreover, although the National Government has broad power over interstate and international commerce, some activities are beyond the scope of the commerce power and, thus, may be regulated only by the States. *See United States v. Lopez*, 514 U.S. 549 (1995). Finally, in the sovereign immunity

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between a State and the United States, 'coercion' is a concept not capable of judicial enforcement." *See Petition for Rehearing and Petition for Rehearing En Banc by the United States as Intervenor, Jim C. v. Arkansas Dep't of Educ.*, No. 98-1830 (8th Cir. Oct. 28, 1999) at 8.

context, Congress may not use the Commerce Clause to abrogate sovereign immunity, *see Seminole*, 517 U.S. at 44, and may not require the States to waive sovereign immunity as a condition of engaging in interstate commerce, *see College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Fund*, 119 S. Ct. 2219 (1999). Indeed, this Court has recognized that "[t]he 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.' " *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985) (Powell, J., dissenting)). *See also Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government"); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) ("[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers").

In sum, under this Court's current jurisprudence, the ability of the National Government to regulate the States using Article I powers depends upon which Article I power is invoked. If Congress attempts to use an Article I power other than the Spending Clause, the attempt to regulate is invalid. In contrast, if Congress uses the Spending Clause and simply attaches conditions to the receipt of federal funds, then the attempt is valid. This inconsistency regarding the scope of Article I powers must be resolved. Accordingly, this Court should grant the Writ.

II. REGARDLESS OF WHETHER THE REQUIRED WAIVER OF SOVEREIGN IMMUNITY APPLIES TO ALL ASPECTS OF STATE GOVERNMENT OR SIMPLY TO ALL OPERATIONS OF THE UNIVERSITY, THE ISSUE OF WHETHER CONGRESS CAN USE THE SPENDING CLAUSE POWER TO REQUIRE WAIVER OF A STATE'S SOVEREIGN IMMUNITY WARRANTS REVIEW BY THIS COURT.

Although 42 U.S.C. § 2000d-7 reads "a *State* shall not be immune" and although 20 U.S.C. § 1687(1)(a) defines "program" as all operations of the State, the National Government insists that the waiver of sovereign immunity does not apply to the entire Commonwealth of Virginia. Rather, the required waiver of sovereign immunity is limited to all operations of George Mason University. (U.S. Resp. at 13-16.) By taking this position, the National Government implies that the breadth of the required waiver has constitutional significance. Presumably, a requirement that one state agency waive sovereign immunity for particular claims is more acceptable than a requirement that the State waive sovereign immunity for a variety of claims if it receives federal funds for a specific purpose. *See Bradley*, 189 F.3d at 758 (upholding a requirement that the State waive sovereign immunity for claims under the Individuals with Disabilities Education Act but invalidating a requirement that the State waive sovereign immunity for claims under the Rehabilitation Act).

However, this distinction is meaningless. The University believes that, regardless of breadth or the amount of

money involved, *all* requirements that a State waive sovereign immunity as a condition of receiving federal funds are unconstitutional. A requirement that a single office of a single agency waive sovereign immunity for a single claim is just as offensive as a requirement that the entire state government waive sovereign immunity for all classes of claims.

Nevertheless, if this distinction has constitutional significance, then it is inapplicable in the present case. The statute requires George Mason University, an institution with more than 20,000 students and a budget in excess of $300 million, to waive sovereign immunity for broad classes of claims if one part of the University receives a single dollar of federal funds. Thus, if an assistant professor in the law school receives a federal grant, the University loses its sovereign immunity defense to frivolous claims from undergraduates. Moreover, given the dependence of many students on federal financial assistance, it is completely unrealistic for any institution of higher education to forgo federal funds. While there may be situations where the required waiver is narrow and directly related to the purpose for which federal money is given, the requirement that large universities waive sovereign immunity or lose all federal money is not such an instance.

In sum, the breadth of the waiver does not diminish the exceptional importance of the issue. Regardless of whether the waiver is confined to the University or applies to all aspects of State government, this Court should decide the constitutionality of such waivers. Accordingly, the Writ should be granted.

III. BECAUSE CONGRESS' ATTEMPT TO ABROGATE THE SOVEREIGN IMMUNITY OF THE STATES FOR TITLE IX CLAIMS IS UNCONSTITUTIONAL, THERE IS NO ALTERNATIVE GROUND FOR THE LOWER COURT'S DECISION.

Finally, the Respondents argue that the decision below is justified on alternative grounds. Specifically, the Respondents may assert that § 2000d-7 constitutes a valid abrogation of sovereign immunity for various federal statutes. If Congress properly has abrogated sovereign immunity, there is no reason to take up the issue of whether Congress could require waiver as a condition of receiving federal funds.

As explained in more detail in the Petition, this argument is simply wrong. Quite simply, the attempted abrogation of sovereign immunity cannot pass the standard set out by *Florida Prepaid Post Secondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999), and reaffirmed by *Kimel*. First, Congress did not make findings of a specific pattern of violations of the Fourteenth Amendment by the States. Second, even if there were such findings, the response of abrogating sovereign immunity for all claims arising under various federal statutes is not proportionate to any purported constitutional violations. *See Florida Prepaid*, 119 S. Ct. at 2210. Accordingly, § 2000d-7 is unconstitutional to the extent that it purports to abrogate sovereign immunity for various federal claims.

Since there is no alternative basis for the judgment, the issue of whether Congress may require a State to waive its sovereign immunity as a condition of receiving

federal funds is squarely before this Court. Accordingly, this Court should grant the Petition for a Writ of Certiorari.

CONCLUSION

At the end of the day, "[i]f the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' " *Dole*, 483 U.S. at 217 (O'Connor, J., joined by Brennan, J., dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)) (internal quotation marks original). Indeed, under the lower court's view of our Constitution, the Spending Clause may be used "to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., joined by Rehnquist, C.J., Scalia, and Thomas, JJ., dissenting). This Court must articulate clear limits on the Spending Clause power. Accordingly, this Court should **GRANT** the Petition for a Writ of Certiorari.

Respectfully submitted this 14th day of January 2000.

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